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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter	)	
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Policies and Rules	)	
Pertaining to the	)	RM-8179
Regulation of	)	
Cellular Carriers	)	

To: Chief, Tariff Division

COMMENTS OF NEW PAR

NEW PAR

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March 19, 1993

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SUMMARY

New Par supports CTIA's Request for Declaratory Ruling and Petition for Rulemaking and requests that the Commission clarify the application of Section 203(a) tariffing requirements to cellular carriers.

Cellular carriers provide local exchange services. To the extent that these services are provided wholly within state boundaries, Section 2(b) of the Communications Act exempts cellular carriers from Section 203(a) tariffing requirements. In areas where cellular carriers provide local exchange services that cross state lines, Section 221(b) provides the same degree of freedom from federal jurisdiction, including tariffing requirements. Section 221(b) restricts the Commission's jurisdiction regardless of whether or not a state has enacted regulatory legislation or is actually regulating.

New Par also supports CTIA in its request for a ruling that cellular carriers are nondominant in their provision of local exchange services and additionally supports CTIA's petition for streamlined tariffing rules for any tariffs that cellular carriers are required to file.

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New Par, by its attorneys, respectfully submits these comments in response to the above-captioned "Request for Declaratory Ruling and Petition for Rulemaking" filed by the Cellular Telecommunications Industry Association ("CTIA") with respect to the Commission's policies and rules pertaining to the regulation of cellular carriers ("Petition").

I. Background

In November of 1992, the United States Court of Appeals for the District of Columbia Circuit invalidated the Commission's longstanding policy of not requiring tariff filings by certain nondominant carriers.[1] The Court interpreted Section 203(a) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 203(a),

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[1] AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

to require every common carrier to file tariffs with the Commission setting forth its terms and rates for interstate and foreign communications. CTIA filed the Petition seeking among other things, Commission clarification that (1) cellular carriers generally do not provide interstate services for purposes of Section 203(a) and therefore are not subject to the tariffing requirement; and (2) to the extent that cellular carriers are required to file tariffs for interstate communications beyond local exchange services, they should be deemed nondominant and therefore not subject to the cost support and other requirements imposed on dominant carriers' tariff filings. New Par strongly supports CTIA's Petition, although it submits that the Act's exemptions, particularly under Section 221(b), reach even further than CTIA proposes.

II. The Commission Should Reaffirm that Cellular Carriers are not Required to File Tariffs for Local Exchange Services, Even When Their Service Areas Cross State Lines.

The tariffing requirements of Section 203(a) are subject to two specific exemptions contained elsewhere in the Act. Section 2(b) of the Act, 47 U.S.C. § 152(b), exempts from certain federal regulations, including the filing of federal interstate communications tariffs, carriers providing wholly intrastate services as

well as "connecting carriers," which are local exchange carriers engaged in interstate communications solely through connections with other carriers. Section 221(b) of the Act, 47 U.S.C. § 221(b), similarly exempts from Commission jurisdiction local exchange services that cross state lines. In fact, the courts have specifically held that, by force of Section 221(b), a carrier that serves a multistate exchange area is assured the same "degree of freedom from federal regulation Section 2(b) provides" for wholly intrastate carriers.[2] The Commission has long held that cellular carriers provide the equivalent of local exchange service and are fully covered by the Section 2(b) and 221(b) exemptions.[3]

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[2] North Carolina Util. Com'n v. FCC, 537 F.2d 787, 795 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); see also New York Telephone Co. v. FCC, 631 F.2d 1059, 1064-65 (2d Cir. 1980); Puerto Rico Telephone Co. v. FCC, 553 F.2d 694, 698-99 (1st Cir. 1977).

[3] Amendment of the Commission's Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175, 194 (1984); see also Cellular Communications Systems, 96 F.C.C.2d 469, 483-84, 504 (1981); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 R.R.2d 1275, 1284 (1986) ("Radio Common Carrier Services") ("In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal, concern.").

As CTIA recommends, the Commission should now clarify that, because cellular services are covered under these exemptions, particularly Section 221(b), cellular providers who operate systems that cross state lines are not required to file tariffs for the provision of what are essentially local exchange services.

A. Section 221(b) Applies to All Local Exchange Service Providers, Regardless of Whether They Are In Fact Regulated by the States

CTIA is correct in stating that Section 221(b) exempts cellular local exchange service from federal tariffing requirements imposed under Section 203(a). New Par submits, however, that Section 221(b) exempts from federal regulation local exchange services beyond those which CTIA demonstrates are exempt. Specifically, the Commission should re-confirm that Section 221(b) exempts from federal regulation all local cellular services regardless of whether such services are in fact actively being rate, entry, or otherwise regulated by a state or local commission or may be so regulated by such a commission under its enabling statute.

Section 221(b) exempts interstate local exchange services "subject to" regulation by state or local authority. The proper definition of "subject to" is

"suffering a particular liability or exposure,"[4] or "liable,"[5] "disposed, prone, or liable to incur or receive."[6] Under this definition, because Congress left the regulation of local exchange services to the States, any aspect of local exchange service that is purely local is "subject to" state or local regulation, whether or not the particular jurisdiction decides to enact legislation or actually to regulate.

As stated above, courts have held that both the plain meaning and legislative history of Section 221(b) confirm that the section is meant to provide the same degree of freedom from federal regulation for multistate, single-exchange telephone systems as wholly intrastate systems would have under Section 2(b). The Supreme Court has ruled that the sweeping language of Section 2(b) "fences off" matters from the Commission's jurisdiction.[7] A similar intent to restrict the Commission's authority was expressed when Congress discussed Section 221(b):

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[4] As in "subject to temptation." Webster's Third New

"[Section 221(b)] . . . leaves local exchange service to local regulation even where a portion of such local exchange service constitutes interstate communications. It is designed to cover cases of cities located within two States, [such] as Texarkana."[8]

Additionally, the Fourth Circuit Court of Appeals addressed the meaning of Section 221(b) when state regulatory commissions relied on it in an attempt to preclude the Commission's jurisdiction over customer premises equipment. The court thoroughly examined the underlying legislative history and concluded that Section 221(b)

> . . . is intended to do no more than to prevent the circumstance that a single telephone exchange serves an area that includes parts of more than one state from enlarging the jurisdiction of the FCC over the business and facilities of that exchange. To put the matter affirmatively, by force of Section 221(b) a local carrier that serves a single multi-state exchange area is assured whatever degree of freedom from federal regulation Section 2(b) provides for uni-state carriers and intrastate telephone business generally.[9]

In other words, just as Section 2(b) exempts all intrastate communications services regardless of the state regulatory status, Section 221(b) similarly exempts all

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[8] 78 Cong. Rec. 10314 (remarks of Rep. Rayburn, June 2, 1934).

[9] North Carolina Util. Com'n, 537 F.2d at 795.

interstate local exchange services, reserving to the States the discretion on whether and how to regulate such services.

The Fourth Circuit's analysis has been adopted by other circuits[10] and by the Commission.[11] Other courts, time and time again, have also interpreted Section 221(b) without regard to whether a state had enacted regulatory legislation or whether an agency was in fact regulating.[12] Further, within the last year the Commission confirmed that Section 221(b) "reserves to the states" the authority to regulate local exchange services that cross state boundaries[13] -- a clear enunciation that the section is an exemption from federal authority and does not rely on the presence of state regulatory activity.

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10 See Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 217 (D.C. Cir. 1982); New York Telephone Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980); Puerto Rico Telephone Co. v. FCC, 553 F.2d 694 (1st Cir. 1977).

11 See Continental Telephone Company of Virginia, 2 F.C.C. Rcd. 5982, n.30 (1987).

12 See, e.g., National Association of Regulatory Utility Commissioners ("NARUC") v. FCC, 746 F.2d 1492, 1500 (D.C. Cir. 1984); NARUC v. FCC, 737 F.2d 1095, 1113, n.47 (D.C. Cir. 1984).

13 South Central Bell Telephone Co., 7 F.C.C. Rcd. 3504, 3505 (1992).

In another sense, "subject to" can mean actually under the authority, control, or power of another."[14] Adhering to this definition, the FCC would lose jurisdiction only if a state regulatory agency exercised authority over an aspect of exchange service. If the state did not exercise authority, the Act's regulatory provisions would apply.

In its Petition, CTIA suggests a compromise between these interpretations of "subject to" that turns on whether states have empowered regulatory agencies to act, whether or not the agencies have affirmatively exercised their authority.[15] While this is a subset of circumstances included within Section 221(b)'s ambit, it denies the States the discretion to choose not to regulate a purely local service. To that degree, it trammels upon the delicate balance between federal and state interests struck by Congress and reflected in the law.

Moreover, nothing in the legislative history or the cases interpreting Section 221(b) requires this compromise. Indeed, in construing Section 221(b), the

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[14] Webster's II New Riverside University Dictionary (Riverside, 1984) (emphasis added).

[15] CTIA Petition at 7.

courts have held that, "It being obviously the intention of the Congress to limit the jurisdiction of the Commission . . . neither the Commission nor the courts should by too strict and narrow a construction of the law defeat such a clear intention."[16] The legislative history merely reflects that, although Congress recognized that states in fact regulated certain interstate local exchange services, Congress intended to protect state regulatory authority over such services, not to make the exemption conditional upon the exercise of that authority:

> [W]here existing intrastate telephone business is being regulated by a State commission, the provisions of this bill shall not apply. . . . There are many cases in the country where, without some saving clause of that kind, the State commissions might be deprived of their power to regulate; and the State commission representatives were jealous, in the preparation of this bill, that those rights should be protected; and we have attempted to do that.[17]

Indeed, restricting the Section 221(b) exemption to cases where state commissions are actually regu-

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[16] Southwestern Bell Telephone Co. v. U.S., 45 F. Supp. 403, 406 (W.D. Mo. 1942).

[17] 78 Cong. Rec. 8823 (remarks of Senator Dill, May 15, 1934) (emphasis added); see also S. Rep. No. 781, 73rd Cong. 2d Sess., 5 and H.R. Rep. No. 1850, 73rd Cong., 2d Sess., 7 ("[The section] . . . will enable those commissions, where authorized to do so, to regulate exchange services in metropolitan areas overlapping state lines.")

lating -- or empowered to regulate -- becomes least defensible when a local exchange encompasses areas in states that have different approaches to carrier regulation. When a portion of a cellular carrier's market area extends beyond a single state, as it does in over 30 MSAs, the carrier is subject to the regulation of each state in which it provides local service. Under an interpretation of Section 221(b) wherein interstate local exchange service is exempted only where the states in fact regulate, or could unilaterally reimpose regulation, if a state representing only a minor portion of the carrier's service area did not choose to regulate the carrier, that carrier would be subject to the federal tariffing requirements. This would be true even though the carrier was fully regulated by the state in which it provides most of its services.[18] There is simply nothing in the plain language or legislative history of 221(b) that indicates Congress intended such a result.

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[18] In short, if the legislators or regulators of a state determine that the public interest is best served by not regulating a local exchange service, nothing in the Act empowers -- let alone requires -- the Commission to usurp state authority and overrule that state's decision. Indeed, the Commission has made this same determination with regard to its own plenary jurisdiction and has found that choosing not to regulate is a valid exercise of authority. Second Computer Inquiry, 77 F.C.C.2d 384, 432-35 (1980).

As discussed in the next section, cellular service is local exchange service. Local exchange service is exempt from federal jurisdiction, including tariffing requirements. The exemption arises from Section 2(b) for cellular systems that operate entirely within a single state and from Section 221(b) for cellular systems that cross state lines. The 221(b) exemption should apply as well to situations where an MSA/RSA is limited to a single state but due to the natural propagation of radio waves, the carrier has a de minimis extension into another state.

B. Local Exchange Service Includes All Non-Toll Communications Service Provided by a Cellular Carrier

Section 221(b) exempts from federal jurisdiction local "exchange service."[19] The Act defines "exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge."[20] This is in contrast to "toll service," which the Act defines as service to "different exchange areas for which there is made a

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19 See, e.g., Department of Defense v. Chesapeake and Potomac Telephone Co., 69 F.C.C.2d 393, 394 (1978).

20 47 U.S.C. § 153(r).

separate charge not included . . . for exchange service."[21]

The Commission and the courts have consistently based their interpretations of the Section 221(b) exemption on the "nature" of the services, not the location of the facilities.[22] In the area of switched message telephone service, the decisive factor has been the presence or absence of a toll charge.[23] Local exchange service, i.e., the type of interstate service exempt under Section

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21 47 U.S.C. § 153(s).

22 See, e.g., National Association of Regulatory Utility Commissioners v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984); California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), cert. den., 434 U.S. 1010 (1978); AT&T Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange Service and Common Control Switching Arrangements, 56 F.C.C.2d 14, 21 (1975).

23 See North Carolina Util. Com'n v. FCC, 552 F.2d 1036, 1045 (4th Cir. 1977); Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services, 57 R.R.2d 1558 at 13 (P & F, 1985); The Consolidated Application of AT&T and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application, 96 F.C.C.2d 18, 26 (Memorandum Opinion, Order and Authorization, 1983); see also Indiana Switch Access Division, File No. W-P-C-5671 (April 10, 1986) (the Act does not apply geographic restrictions to the local exchange service of telephone companies).

221(b), is that for which a local exchange carrier imposes no toll charges.[24] Therefore, to the extent that a cellular provider is functioning as a local exchange carrier -- i.e., to the extent it provides service to customers for standard per-minute "air time" and monthly access fees and no additional toll charges -- it is exempt from the tariff requirements of Section 203(a), regardless of the size of the area in which its services are provided.

In the cellular context, the size of this area will often consist of multiple MSAs/RSAs. One of the Commission's goals in establishing rules for cellular service was to create a nationwide, seamless mobile telephone system. This goal is closest to reality in any of several integrated systems where multiple MSA/RSA systems are under common ownership, control, or management, and where consumers consider themselves customers of a large,

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[24] Generally, the distance at which a local call becomes a long distance toll call is determined by state regulators. Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services, 57 R.R.2d 1558 n.13 (1985).

area-wide cellular system.[25] The advantages to users are numerous. They have a much wider "home" territory in which they are free from "roamer" charges. They also enjoy sophisticated engineering and advanced services that are made possible by economies of scale. Within such systems the geographical boundary of the "system of exchanges" is the aggregate boundaries of the entire system.[26]

The fact that some of these larger no-toll service regions require a higher monthly access fee is not sufficient to require that such service be considered a toll service. Traditional MTS "wide area calling plans"[27] are exempt from the Commission's jurisdiction,

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[25] New Par operates one such system that extends from Grand Rapids, Michigan to Toledo, Ohio and another such system that extends from Columbus, Ohio to several counties within the Cincinnati MSA that lie in Indiana and Kentucky.

[26] By licensing each cellular carrier to an entire MSA or RSA and classifying each carrier as a local exchange provider, the Commission in essence characterized each MSA and RSA as a "local exchange."

[27] For example, in addition to standard local calling, for a larger monthly subscription fee New England Telephone offers Measured Circle Service, Metropolitan Boston Service, and Bay State Service. The latter includes toll-free calling to the entire state of Massachusetts. Michigan Bell similarly offers Detroit residential customers Circle-20 and Circle-30 calling, with toll-free calls extending 20 or 30 miles from the originating central office, and
(Footnote continued)

pursuant to Section 221(b), in exchanges that straddle state lines.[28]

Due to the realities of present-day cellular service and the intricacies of available options and billing plans, the Commission should reaffirm its previous conclusion that the entire range of cellular calling plans and rates is best left to local regulators.[29] Consequently, the Commission should find that all cellular services offered without a distinct, additional toll charge constitute local exchange services, even where such services cross state lines. When cellular carriers charge separate tolls for interstate communication, only those tolls should be subject to tariff requirements.

C. Tariffs Are Not Required for "Roaming Agreements."

The tariff filing requirements of Section 203(a) apply only to "communication between points." 47 U.S.C. § 203(a). When the subscriber of one cellular

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(Footnote 27 continued from previous page)
Area Wide Calling, with toll-free service to the entire 313 area code.

[28] Southwestern Bell Telephone Co. v. U.S., 45 F. Supp. 403 (W.D. Mo. 1942). (Commission lacks jurisdiction to require Southwestern Bell to file tariffs for a calling "zone" system encompassing parts of Missouri and Kansas)

[29] Cellular Communications Systems, 89 F.C.C.2d 58, 96 (1982).

carrier (the home carrier) ventures into territory served by another carrier (the host carrier) and places a call, the subscriber either must make separate arrangements with the host carrier for the use of the host carrier's facilities or it may place calls automatically if the home and host carriers have entered into an inter-carrier "roaming" agreement to provide for automatic registration and roaming by their respective subscribers.

Roaming agreements further the Commission's goal of establishing a seamless, nationwide mobile communications system by pre-registering subscribers on foreign systems. They do not, however, create a new and different interstate telecommunications service, are not communications between points, and are not subject to Section 203's tariffing requirement. The roamer, like the carrier's home subscribers, uses and pays for local exchange and interexchange services under whatever system of regulation is already applied to those services. Local exchange roaming (i.e., air time) rates usually are higher than "home" rates due to the charges for the additional services performed, including automatic registration, billing, and collection performed by the host carrier and passed on to subscribers by the home carrier. This billing and collection service is an inter-carrier

service and is not "communication between points." Consequently, neither the home nor the host carrier need file a tariff for the roaming agreement.[30] When roamers place interstate, interexchange calls, however, they too pay additional "toll" charges and such calls would be subject to Section 203(a) in the same manner as "home" subscriber toll calls.[31]

Similarly, separate tariff provisions are required for "automatic call delivery" or "follow-me roaming" services only to the extent they constitute interstate "communications between points" for which toll charges are imposed by the cellular carrier. These services deliver or forward calls from the home system to the subscriber in a system determined by the subscriber. Charges for such services, as with standard roaming services, will generally be the same as those applied to

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[30] See Detariffing of Billing and Collection Services, 102 F.C.C. 2d 1150, 1168 (1986) (stating emphatically that "billing and collection is a financial and administrative service" that is "not subject to regulation under Title II of the [Communications] Act").

[31] As CTIA contends, the Commission should also confirm that cellular carriers are not subject to Section 203(a) tariffing requirements when they simply provide access to unaffiliated interexchange carriers and do not resell or otherwise provide interexchange services.

standard home subscriber calls placed from the home system to the "forwarded" location.

III. The Commission Should Confirm that Cellular Carriers are Nondominant.

New Par fully supports CTIA's request for a declaratory ruling that cellular carriers are nondominant and eligible for streamlined tariff filing requirements

than adequate factual evidence of the demand and supply substitutability to justify a Commission determination of nondominance.[33]

Moreover, competition in the cellular marketplace is expanding in some metropolitan areas with the addition of Enhanced Specialized Mobile Radio, which will offer services that are functionally equivalent to cellular.[34] The competition will soon be bolstered dramatically as paging systems increase their capabilities and as the personal mobile communications marketplace is

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(Footnote 32 continued from previous page)
profit-maximizing competitors are most likely to determine their own pricing strategies without collusion and that in markets with only a few participants the fear of being caught is a significant deterrent to anticompetitive practices. Sherali and Rajan, "A Game Theoretic-Mathematical Programming Analysis of Cooperative Phenomena in Oligopolistic Markets," 34 Operations Research, 683 (September-October 1986), referencing coalition formation techniques described in Hart and Kurz, "Endogenous Formation of Coalitions," 51 Econometrica, 1047-1064 (1983); Werden and Baumann, "A Simple Model of Imperfect Competition in Which Four are Few but Three are Not," 34 Journal of Industrial Economics, 331 (March 1986).

[33] CTIA Petition at 16-20; see Fourth Report and Order on Competitive Common Carrier Services, 95 F.C.C.2d 554, 582 (1983).

[34] See Fleet Call, Inc., 6 F.C.C. Rcd. 1533 (1991). Enhanced Specialized Mobile Radio will be a potent competitor to cellular because, as a private carrier, it is exempt from state regulation, including tariff requirements.

joined by operators of low-earth-orbit satellite communications and personal communications systems, offering two-way communications with digital, microcell technology.

The current market situation in cellular communications demonstrates that cellular providers should be declared nondominant. The expanded competition that new technologies will present underscores this demonstration.

New Par also supports CTIA's proposal for streamlined tariffing rules for those cases where cellular carriers must file tariffs. New Par endorses most of the rules proposed in the Commission's Notice of Proposed Rulemaking in CC Docket No. 93-36 (rel. Feb. 19, 1993). Specifically, New Par urges the Commission to adopt rules allowing the tariffs of cellular carriers to become effective on a one day's notice and allowing these tariffs to express rates in a manner of the carrier's choosing, including ranges or maxima. New Par urges the Commission to use caution in mandating filing on computer disk, particularly if the Commission requires specific versions of the operating system and software of particular vendors. For example, both MS DOS 5.0 and WordPerfect 5.1 are scheduled to be updated within a short time, making the proposed standards outdated at their adoption. Al-

lowing carriers the option of filing either on disk or on paper would alleviate the problem.

Respectfully submitted,